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Nos. 91-543, 91-558, 91-563
IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1991

THE STATE OF NEW YORK, et al,

Petitioners,

v

THE UNITED STATES OF AMERICA, et al,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF MICHIGAN IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

WHETHER THE LOW-LEVEL RADIOACTIVE POLICY AMENDMENTS ACT OF 1985 WHICH MANDATES A STATE TO EXERCISE ITS EXECUTIVE AND LEGISLATIVE POWERS VIOLATES THE GUARANTEE CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE IN THE EXERCISE OF THOSE POWERS IT COMPELS A STATE TO BE ACCOUNTABLE TO THE UNITED STATES CONGRESS RATHER THAN TO THE MAJORITARIAN WILL OF ITS CITIZENS.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE STATE OF MICHIGAN

The decision in these cases by the United States Court of Appeals for the Second Circuit presents important constitutional questions pertaining to the extent to which federal authority under the Commerce Clause can impinge upon the autonomy of independent sovereign States within this Union.

Petitioners are challenging the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 USC §§ 2021b-2021j (1985 Act) on state sovereignty grounds which have their basis in the Tenth Amendment of the United States Constitution and the Guarantee Clause found in Art IV, § 4 of the United States Constitution. Michigan supports the arguments advanced by Petitioner State of New York and amicus State

of Connecticut that the 1985 Act violates the state sovereignty implicit in the Tenth Amendment of the United States Constitution. In addition, Michigan urges this Court to find that the 1985 Act violates State sovereignty implicit in the Guarantee Clause of the United States Constitution requiring the United States to guarantee to every State in this Union a republican form of government. New York has raised this issue merely as an element of State sovereignty and not as an independent ground for declaring the 1985 Act unconstitutional. Petitioner County of Allegany has specifically raised this issue as it relates to a local unit of government. Michigan asserts that the Guarantee Clause most directly and properly relates to a State.

In 1980, the United States Congress passed the Low-Level Radioactive Waste Policy Act, 42 USC §§ 2021b <u>et seq</u>, P.L. 96-573 (1980 Act). The 1980 Act was amended in 1985 by the passage of the 1985 Act. The 1985 Act mandates that each State must provide for the disposal of all low-level radioactive waste (LLRW), generated within its borders except for defense related LLRW generated by the federal government. Pursuant to the <u>policy</u> of the 1980 Act, Michigan responded by joining a compact in 1982 known as the Midwest Interstate Low-Level Radioactive Waste Management Compact (Midwest Compact). The United States Congress consented to the Midwest Compact only after passage of the 1985 Act which mandated its 1980 policy. In fact, Congress conditioned its consent upon the

mandates contained within the 1985 Act. The United States Congress has made no effort to provide financing to the States obligated to execute this federal policy.

The State of Michigan has taken numerous executive and legislative actions in furtherance of the congressional mandates contained in the 1985 Act. The following list represents some of those actions taken.

1. Entering into the Midwest Interstate Low-Level Radioactive Waste Compact, through the passage of legislation, 1982 PA 460.

2. The passage of legislation, 1987 PA 204, creating a Low-Level Radioactive Waste Authority to carry out the State's responsibilities to provide for the disposal of LLRW.

3. The passage of legislation, 1987 PA 203, to provide for Michigan Department of Public Health oversight over the siting of a Low-Level Radioactive Waste Disposal Facility.

4. The appointment of a Low-Level Radioactive Waste Authority Director and a Commissioner to the Midwest Interstate Low-Level Radioactive Waste Compact.

5. The Amendment of a State statute, 1987 PA 113 in order to allow for the previously prohibited disposal of LLRW in Michigan.

In June of 1987, Michigan was selected by the Midwest Interstate Low-Level Radioactive Waste Management Commission (Commission) as the first host State for a regional low-level radioactive waste disposal facility.

As part of its responsibility to develop a LLRW disposal facility, Michigan was required to adopt siting criteria. The siting criteria were completed on May 16, 1989 after an extensive process which considered such factors as the extent of valuable fresh water

sources within the State, in light of the mandate of Mich Const 1963, Art IV, § 52 which provides:

> Sec. 52. The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

The siting process in Michigan was funded pursuant to a pre-operational funding agreement between Michigan and the Commission. In August of 1990 the Commission threatened to withhold any further funding unless Michigan changed its siting criteria by making them less stringent. Michigan refused to change these criteria. The Commission withheld further funding.

In November of 1990 the sited States of South Carolina, Washington, and Nevada denied access to their LLRW disposal facilities to LLRW generators located within Michigan. Michigan generators are, therefore, storing their LLRW on site. In July of 1991 the Commission voted to revoke Michigan's membership in the Compact.

The State of Michigan is challenging the constitutionality of the 1985 Act on State sovereignty and Guarantee Clause grounds in _State of Michigan, et al_ v _United States of America, et al_, US District Court, WD of Michigan, Case No. 5-90-CV-27. Michigan is currently appealing the dismissal of this case to the United States Court of Appeals for the Sixth Circuit, Docket No. 91-2281.

The Court of Appeals has ordered that the case be held in abeyance pending the outcome of this case.

SUMMARY OF ARGUMENT

The United States Constitution has established a federal form of government in which a balance of power exists between the national government and the sovereign States comprising the Union represented by the national government. This balance of power inures to the benefit of individual citizens whose rights are protected when neither level of government becomes all-powerful.

Congress is restricted in the exercise of its delegated Commerce Clause authority by the retained rights of the sovereign States comprising the Union.

This Court has recognized the existence of such limits, but the nature and content of the limits has proven difficult to delineate. This difficulty is most readily apparent in National League of Cities v Usery, 426 US 833 (1976), and Garcia v San Antonio Metropolitan Transit Authority, 469 US 528 (1985).

The Garcia case articulated the political process doctrine as the principal means of insuring the protection of a State's sovereignty. The Court recognized that additional limits exist which restrict Congress under its delegated Commerce Clause authority. However, in the context of the Garcia case, this Court held that it need not determine the extent of these limits. When, as in the case of the 1985 Act, Congress has so

intrusively impinged on a State's sovereignty, it is appropriate to ascertain the limits on congressional authority and to determine whether Congress has exceeded those limits.

The 1985 Act is extraordinarily intrusive upon the autonomy of the sovereign States. The extreme nature of this intrusion is apparent from a review of the mandates of the 1985 Act which compel States to engage in the commerce of disposing of LLRW. It goes well beyond statutes compelling States to engage in the regulation of commerce. The intrusion is even more extreme when the punitive measures to compel the States to engage in the commerce are considered. These punitive measures involve a shifting of title to, and liability for, LLRW

from either the private sector or in some cases the federal government itself.

The Guarantee Clause of the United States Constitution guarantees to every State a republican form of government. A republican form of government is one in which the people choose their rulers who in turn pass their own laws through the majoritarian process.

It is appropriate to rely upon the protections afforded by the Guarantee Clause as a restraint on Congress in the exercise of its delegated authority under the Commerce Clause. Michigan urges the adoption by the Court of the analysis of this restraint by Professor Deborah Jones Merritt from the University of Illinois School of Law. While this suggested Guarantee Clause analysis has never been

directly applied by the Court, it is consistent with the rationale and result in several decisions which have recognized that a congressional enactment which commandeers either the legislative or executive branches of the State government is constitutionally suspect.

The 1985 Act commandeers both the legislative and executive branches of a State's government. Its mandates implement federal policies and make State governments accountable to private entities and to the federal government rather than to a State's own citizens thereby denying the States a republican form of government as guaranteed to them by the Guarantee Clause of the United States Constitution.

ARGUMENT

I

CONGRESS IS LIMITED IN THE EXERCISE OF ITS COMMERCE CLAUSE AUTHORITY BY THE RIGHTS RETAINED BY THE SOVEREIGN STATES UNDER THE FEDERAL SYSTEM.

This Court has recognized "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power . . ." INS v Chadha, 469 US 919, 951 (1983). As Justice Powell observed in his dissent in Garcia v San Antonio Metropolitan Transit Authority, 469 US 528, 565 (1985) "[t]he Court offers no reason to think that this pressure will not operate when Congress seeks to invoke its powers under the Commerce Clause, notwithstanding the electoral role of the states." (footnote omitted). Michigan asserts that the 1985 Act is a clear example where the

"hydraulic pressure" upon the United States Congress to resolve the highly charged political issue of LLRW disposal operated to the extreme and resulted in Congress exceeding the outer limits of its Commerce Clause authority.

The Framers of the Constitution recognized advantages in dividing power between the national and State governments. Madison asserted that "[i]n the compound Republic of America a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51 at 351 (J. Madison) (J. Cooke Ed. 1961). Alexander Hamilton similarly opined that: "[P]ower being almost always the rival of power the gen-

eral government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government." The Federalist No. 28 at 179 (A. Hamilton) (J. Cooke Ed. 1961). In a viable federal system, the power retained by the States will serve as a check on the national government exceeding the outer limits of its authority. This balance of power is upset when the States lose their retained sovereign rights.

This Court has recently recognized the importance of Madison's "double security." In Gregory v Ashcroft, 501 US ___, 115 L Ed 2d 410, 423 (1991), Justice O'Connor writing for the majority concluded:

> If this "double security" is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty.

In passing the 1985 Act, Congress has exceeded constitutional restraints on its authority. Michigan urges this Court to apply those restraints, thereby re-establishing the proper constitutional balance.

Congress does not have unlimited power under its delegated Commerce Clause authority to intrude on the sovereignty of the independent States. This Court has struggled with defining those limits since National League of Cities v Usery, 426 US 833 (1976). In Usery, this Court adopted what has become known as the

"traditional governmental functions" doctrine as the means by which Courts should determine if Congress has exceeded its Commerce Clause authority by intruding on State sovereignty. The difficulties inherent in applying the traditional governmental functions doctrine became apparent during the years following the Usery decision. Finally, in Garcia this Court repudiated the traditional governmental functions test as unworkable.

> Our examination of this "function" standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental function" is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which National League of Cities purported to rest. That case, accordingly, is overruled.
> Garcia, 469 US at 531.

The traditional governmental functions doctrine was repudiated at the same time

that the majority affirmed the principles of federalism and state sovereignty.

> [T]he text of the Constitution provides the beginning rather than the final answer to every inquiry into questions of federalism, for "[b]ehind the words of the constitutional provisions are postulates which limit and control." [citations omitted] National League of Cities reflected the general conviction that the Constitution precludes "the National Government [from] devour[ing] the essentials of state sovereignty." [citations omitted] In order to be faithful to the underlying federal premises of the Constitution, Courts must look for the "postulates which limit and control."
>
> What has proved problematic is not the perception that the Constitution's <u>federal structure imposes limitations on the Commerce Clause</u> but rather the nature and content of those limitations.
> <u>Garcia</u>, 469 US at 547.
> (Emphasis added).

After rejecting the traditional governmental functions doctrine articulated in <u>Usery</u> which had been based upon the Tenth

Amendment, this Court in <u>Garcia</u> struggled with the language of the Tenth Amendment which on its face does not appear to support any affirmative limit on Congressional power. Deborah Jones Merritt, <u>The Guarantee Clause and State Autonomy: Federalism for a Third Century</u>, 88 Columbia Law Review 1, 12 (1988). In fact, the Court previously recognized that the Tenth Amendment language "states but a truism that all is retained which has not been surrendered." <u>United States v Darby</u>, 312 US 100, 124 (1941).

In its efforts to determine the limitations on the Commerce Clause the majority in <u>Garcia</u> developed the political process doctrine. Unlike the traditional governmental functions doctrine developed in <u>Usery</u>, the political process doctrine

does not appear to be rooted in any constitutional mandate. Rather, it is based principally upon the federal structure itself.

> In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.
> Garcia, 469 US at 552.

The majority in Garcia did not hold that the political process doctrine was the only means of protecting a State's sovereign interests against the intrusion of Congress under its Commerce Clause authority. The initial enunciation of the political process doctrine in Garcia states:

> . . . the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.
> Garcia, 469 US at 550-551.
> (Emphasis added).

By speaking in terms of "principal means" in commencing its discussion of the political process doctrine, the majority was indicating that the doctrine is not the exclusive means for protecting State sovereignty. The Court recognized this fact when, at the conclusion of its discussion of the doctrine, it stated:

> Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional actions--the built-in restraints that our system provides through state participation and federal governmental action.
> Garcia, 469 US at 556.
> (Emphasis added).

By characterizing the political process doctrine as the "principal limit" the Court necessarily implies that there are other limits as well. In fact, the Court explicitly determined that under the specific facts of Garcia it need not "define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." Garcia, 469 US at 556. The 1985 Act compels this Court to define those limits.

Justice Brennan in South Carolina v Baker, 485 US 505, 512 (1989) (plurality opinion), did suggest that Garcia stands for the proposition that the political process doctrine is the exclusive protector of State sovereignty against intrusion by Congress, but this reading

ignores the analysis discussed above. Justice Scalia concurring in part and concurring in the judgment in South Carolina states that Justice Brennan's conclusion that the "National Political Process" is the State's only constitutional protection "misdescribes" the holding in Garcia. South Carolina, 485 US at 528.

In fact, the majority in Garcia did recognize the existence of limits on the Federal Government's power to interfere with State functions. Garcia, 469 US at 547. Furthermore, the majority even recognized some constitutionally mandated limits on Congress' power.

> With rare exceptions, like the guarantee, in Article IV, § 3, of state territorial integrity, the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace.
> Garcia, 469 US at 550.

While recognizing that such exceptions are rare, Michigan asserts that one such exception is the Guarantee Clause in Art IV, § 4 guaranteeing to every State in the Union a republican form of government.

II

CONGRESS HAS EXCEEDED LIMITS IMPOSED UPON IT BY THE GUARANTEE CLAUSE IN ITS ENACTMENT OF THE 1985 ACT.

The 1985 Act was promulgated pursuant to Congress' delegated Commerce Clause authority. No other constitutional predicates such as the Spending Clause or the Civil War Amendments justify Congress' intrusion on State sovereignty. It has been held that the regulation of the disposal of low-level radioactive waste implicates the Commerce Clause. Philadelphia v New Jersey, 437 US 617

(1978), and Washington State Building and Construction Trades Council v Spellman, 684 F2d 627 (9th Cir. 1982), cert denied 461 US 913 (1983). However, with the 1985 Act Congress has gone beyond simply regulating commerce and has mandated that States take responsibility for the LLRW generated primarily by private entities and to a lesser extent by the federal government. The 1985 Act compels a sovereign State not just to regulate LLRW in lieu of federal regulation, but actually to engage in a specifically identified type of commerce.

This Court has recognized that "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." Reeves, Inc. v Stake,

447 US 429, 437 (1980). Michigan asserts that there is also no indication of a constitutional plan to permit Congress to mandate that a State operate in the free market. It is the compulsion to engage in this commerce which Michigan asserts intrudes upon its sovereignty. Specifically, the Congressional mandate that sovereign States exercise their legislative and executive powers to engage in the commerce of LLRW disposal impinges upon the guarantee expressed in the United States Constitution of a republican form of government. The compulsion contained within the 1985 Act makes the legislative and executive branches of a sovereign State answerable not to the people who have elected these bodies, but to the United States Congress who is mandating these bodies to implement federal policy.

While the mandate to engage in the commerce of LLRW disposal by itself intrudes upon a State's sovereignty, the so-called "take title" and liability provisions of the 1985 Act make the intrusion on State sovereignty even more egregious. This provision of the 1985 Act, 42 USC § 2021e(d)(2)(C), requires that if States are unable to engage in the commerce of LLRW disposal by January 1, 1996, they must accept from private and federal generators of LLRW, both title to the LLRW and liability for all damages directly or indirectly related to the LLRW. This draconian punitive measure totally ignores the States' sovereignty. A review of the legislative history of the 1985 Act reveals the unprecedented punitive nature of this provision. Senator J. Bennett

Johnston, co-sponsor of the 1985 Act stated:

> This language insures that the State will not be able to avoid the financial consequences of failure to provide adequately for the disposal of its low-level radioactive waste, even though it may find a way to avoid taking title or possession in a timely manner . . . In the context of this amendment, the term "damages" includes both actual and punitive damages from actions taken against a generator or owner of waste . . .
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> ***
>
> That means that if some generator of nuclear waste must close down, for example, by reason of failure of the State to accept possession and title to this nuclear waste then the State is responsible for all damages . . . It is a very far-reaching, difficult, and punitive provision, but we mean it to be precisely that. (emphasis added) Cong. Rec. 818113 (Dec. 19, 1985 Daily ed.) remarks of Senator Johnston.

The punitive nature of the take title provision appears to be unique among congressional enactments. Representative Edward J. Markey stated:

> One of the more controversial provisions in the Senate Bill relates to States assuming title and liability for waste in 1996 and requires states to reimburse generators for surcharges. I have requested the Congressional Research Service to study the constitutionality of such a requirement. Their findings, in a study dated December 16, 1985 found that these provisions raised constitutional issues under the Tenth and Eleventh Amendments. I agree. I cannot recall any statute which has ever sought to impose such a liability upon states. The provision may not pass constitutional challenge... (99 Cong. Rec., H 13077 Daily ed. December 19, 1985).

If the mandates in the 1985 Act are constitutional, there is nothing which would prevent federal legislation mandating that each State take title to, assume all liability for, and provide for the disposal of, all hazardous waste generated within its borders. In Michigan during 1986 a total of 3,800,000 tons of hazardous industrial waste was generated

compared to 383 tons of low-level radioactive waste. Michigan contends that the principles of federalism embodied in the United States Constitution do not contemplate or permit such a fundamental shift of liability from the private sector to a sovereign State. On the contrary, the United States Constitution contains specific language protecting the sovereignty of States and precluding the imposition of such onerous responsibilities which stem not from the actions of the State, but from private entities.

The Guarantee Clause of the United States Constitution set forth at Art IV, § 4 provides, in part, as follows:

> The United States shall guarantee to every State in this Union a Republican Form of Government . . .

A republican government was defined by Associate Justice Wilson in Chisholm v

Georgia, 2 U.S. (2 Dall.) 419 (1793). In reference to the State of Georgia, Justice Wilson stated that "I know the Government of that State to be republican; and my short definition of such a Government is,--one constructed on this principle that the Supreme Power resides in the body of the people." Chisholm, 2 U.S. (2 Dall.) at 457. In In re Duncan, 139 US 449, 461 (1891), Chief Justice Fuller writing for a unanimous Court discussed the distinguishing features of a republican form of government:

> By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and

> State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power as against the sudden impulses of mere majorities.

Chandler, Enslen and Renstrom, The Constitutional Law Dictionary, Volume I, p. 56 (1985), defines republicanism as:

> Doctrine of government by the people through majority rule . . .

Thus, the essence of a republican form of government is one in which the people choose their rulers and through their rulers pass their own laws through the majoritarian process. The Constitution guarantees to the people this form of government by guaranteeing it to every State in the Union.

Professor Deborah Jones Merritt in her article, The Guarantee Clause and

State Autonomy: Federalism for a Third Century, 88 Columbia Law Review 1 (1988), has extensively and perceptively analyzed the justification for relying upon the Guarantee Clause as a restraint on federal power to interfere with State autonomy. Professor Merritt concludes that "the states cannot enjoy republican governments unless they retain sufficient autonomy to establish and maintain their own forms of government." Merritt, 88 Columbia Law Review at 2. After discussing the Garcia opinion, Professor Merritt further concludes: "It is preferable to rest determination of federalism issues on a specific constitutional command, such as the guarantee clause, than on notions of political accountability that find no support in the constitutional text." 88 Columbia Law Review at 21,

n. 118. Professor Tribe has similarly suggested using the Guarantee Clause. L. Tribe, American Constitutional Law, (2nd Ed), § 5-23, pp 397-398 (1988). Michigan urges this Court to adopt the analysis in Professor Merritt's comprehensive and thoughtful article and recognize that the Guarantee Clause imposes restraints upon federal power to interfere with State autonomy.

Professor Merritt concludes that the Guarantee Clause has two aspects: "On the one hand, the clause prohibits the states from adopting non-republican forms of government. On the other hand, as long as the states adhere to republican principles the clause forbids the federal government from interfering with state governments in a way that would destroy

their republican character." Merritt, 88 Columbia Law Review at 25. Professor Merritt bases this conclusion on an analysis of both the text of the Guarantee Clause and upon its history. See Merritt, 88 Columbia Law Review at 22-36. She forcefully argues that "the citizens of a state cannot operate a republican government, 'choose[ing] their own officials' and 'enact[ing] their own laws,' if their government is beholden to Washington." Merritt, 88 Columbia Law Review at 25, citing the Federalist No. 39 at 251 (J. Madison) (J. Cooke Ed. 1961). In the context of the 1985 Act, a State cannot enjoy a republican form of government when, in the absence of any other constitutional predicate, the Congress under its Commerce Clause authority usurps the legislative and

executive branches of a State government for its own policies.

This Court's decision in Luther v Borden, 48 US (7 How.) 1 (1849), suggests that a challenge to the 1985 Act based upon the Guarantee Clause is not justiciable. Professor Merritt makes a convincing case that a Guarantee Clause claim based upon allegations of intrusions upon State autonomy is justiciable. Professor Merritt concludes that "neither Supreme Court precedent nor considerations of policy foreclose adjudication of claims that the Federal Government has violated the Guarantee Clause by intruding upon state autonomy." Merritt, 88 Columbia Law Review at 70-71. This Court has recently recognized that the Guarantee Clause imposes limits on judicial review of State action.

> This rule is no more than . . . a recognition of a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders. US Const. Art. IV, § 4; US Const. Amdt. X [further citations omitted] Gregory, 115 L Ed 2d at 425.

Michigan contends that Congress should similarly be constrained in the exercise of its Commerce Clause authority in the absence of constitutional predicates justifying intrusion upon State sovereignty.

A majority of this Court has cited a portion of Professor Merritt's article which asserts that the Guarantee Clause directly commands that States have the ability to set qualifications for their government offices by promising the States a republican form of government. Gregory, 115 L Ed 2d at 422. Michigan

now urges this Court to consider the analysis by Professor Merritt in that section of her article entitled "Employing the States as Agents of the Nation" as it relates to the Commerce Clause authority of the United States Congress. Merritt, 88 Columbia Law Review at 60-70.

> Federal attempts to appropriate state governmental resources in this manner deny the states a republican form of government. In a republican government, all power derives from the voters. The citizens in a republican state decide when to exercise their legislative or executive power and how to wield that authority. If the federal government forces the states to adopt a statute, it destroys this relationship between state voters and their representatives: state legislators become accountable to Congress, rather than to their constituents. Similarly, if the national government compels the states to enforce federal regulatory programs, state budgets and executive resources reflect federal priorities rather than the wishes of local citizens. These results are antithetical to the popular control exerted in a republican form of government.
> Merritt, 88 Columbia Law Review at 61. (footnote omitted).

Professor Merritt argues that federal attempts to appropriate State governmental resources by compelling States to exercise their legislative or executive authority to implement federal programs destroys the relationship between the State voters and their representatives. She argues that State legislators become accountable to Congress rather than to their constituents, thus denying the States a republican form of government. Merritt, 88 Columbia Law Review at 61. This Court has suggested that this type of compulsion by the federal government over State legislative or executive authorities is constitutionally infirm. While this Court has not explicitly used this Guarantee Clause analysis in evaluating Congressional enactments, the analysis is consistent with the rationale

and result in several decisions. For example, in South Dakota v Dole, 483 US 203 (1987), the Court concluded that Congress' authority under the Spending Clause is not unlimited and is affected by five conditions. South Dakota, 483 US at 207. The fifth recognized limit was that "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" (citation omitted). South Dakota, 483 US at 211. In Hodel v Virginia Surface Mining & Reclamation Ass'n, 452 US 264 (1981), this Court stated:

> If a state does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regula-

> tory program. (citations omitted). Hodel, 452 US at 288. (Emphasis added).

The Court concluded that the conditional preemption in Hodel was not so compulsive as to intrude on a State's sovereignty.

In FERC v Mississippi, 456 US 742 (1982), the State of Mississippi challenged the Public Utility Regulatory Policies Act of 1968 (PURPA) which was part of a package of legislation to combat the nationwide energy crisis. Mississippi asserted the requirements in Titles I and III of PURPA that the States consider specified rate-making standards violated its sovereignty. The Court noted that PURPA only required consideration of federal standards and that if a State stopped regulating in the utility field it would not even have to consider

the standards. FERC, 456 US at 764. This Court then held:

> In short, Titles I and III do not involve the compelled exercise of Mississippi's sovereign powers and, equally important, they do not set a mandatory agenda to be considered in all events by state legislative or administrative decision makers. As we read them, Titles I and III simply establish requirements for continued state activity in an otherwise preemptible field.
> FERC, 456 US at 769.
> (Emphasis added, footnote omitted).

In South Carolina v Baker, 485 US 505 (1989), South Carolina challenged § 310 of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) which removed a federal income tax exemption for bonds issued by States and local governments unless those bonds were issued in a registered form. This meant that for States to continue to offer lower interest rates and remain competitive in the

bond market, they would have to issue registered bonds. The removal of the income tax exemption was part of a statutory program to eliminate tax evasion. Section 310 of TEFRA ". . . covers not only state bonds but also bonds issued by the United States in private corporations." Baker, 485 US at 510. Thus, unlike the 1985 Act, TEFRA was not directed exclusively at the States. In finding § 310 constitutional, the Court stated:

> Because by hypothesis, § 310 effectively prohibits issuing unregistered bonds, it presents the very situation FERC [v Mississippi, 456 US 742 (1982)] distinguished from a commandeering of state regulatory machinery: the extent to which the Tenth Amendment "shields" the states from generally applicable regulations. (citations omitted)
> Baker, 485 US at 514.
> (Emphasis added).

Thus, in Baker, this Court used a similar analysis to FERC and found that there was

not a commandeering of State powers.

Even in Garcia the majority recognized that to the extent left open to them by the Constitution States must be free from this form of compulsion.

> The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that the citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else--including the judiciary--deem state involvement to be.
> Garcia, 469 US at 546.

The 1985 Act is a statute aimed exclusively at the States, mandating that they carry out and implement a federal policy for LLRW disposal. This mandate inevitably requires States to exercise their legislative and executive powers in order to comply with their disposal

responsibility for all LLRW generated within their respective borders.

By imposing the burden for the disposal of low-level radioactive waste upon the States, the 1985 Act requires Michigan's legislature to pass laws, to utilize the State's credit to provide for the disposal of LLRW, to take title to the LLRW, and to assume all liability arising from the LLRW. This federal edict directly appropriates Michigan's credit, and indirectly that of its citizens, to cover a liability which rightfully belongs to the private proprietary and federal generators of LLRW. It consequently places Michigan's Treasury at an enormous risk without giving Michigan any choice in this decision. It directly compels Michigan to extend its credit in

aid of private entities who no longer need take any responsibility for their waste. This compulsion directly contravenes Michigan's Constitution, Art IX, § 18 which provides:

> Sec. 18. The credit of the state shall not be granted to, nor in aid of any person, association or corporation, public or private, except as authorized in this Constitution.

The expenditure of funds and the utilization of its credit by Michigan to implement the federal government's LLRW disposal policy originally set forth in the 1980 Act and made mandatory by the 1985 Act reflects the priorities of Congress rather than the priorities of Michigan citizens and thus works a denial of a republican form of government in violation of the Guarantee Clause. Michigan's executive and legislative

branches have been made the agents of the federal government rather than representatives of the Michigan citizens. By being accountable to the federal government rather than its own citizens the law denies Michigan citizens the popular control exerted in a republican form of government.

The Guarantee Clause is a vital element in the federal structure of the United States. It guarantees that in areas of power reserved to the States the majority will of the people shall prevail. It is part and parcel of the "double security" recognized by Madison. Its protection insures that the "double security" continues to exist. A similar check on power is inherent in the balance of power between the three branches of

the federal government. This Court has been reluctant to allow a deviation from this balance of power as established in the Constitution even where the shift of the power is agreed upon between the parties in question. For example, in _INS_ v _Chadha_, 469 US 919 (1983), Congress and the President had both consented to a statutory provision authorizing one house of Congress to veto an executive decision. The Court stressed the importance of checking abuses of political power in invalidating this provision. _INS_, 469 US at 946-951, 959. In the instant case, the Court of Appeals has applied the political process doctrine from the _Garcia_ case in a review of the 1985 Act. When, as in this case, the statute in question significantly shifts the balance of power from the States to Congress,

Michigan urges this Court to conclude that it infringes upon the rights guaranteed to States under the Guarantee Clause. The Court of Appeals' decision in the instant case was based upon a restrictive reading of the opinion in _Garcia_. It read _Garcia_ as holding that the _only_ protection for state sovereign interests is ". . . by procedural safeguards inherent in the structure of the federal system . . ." 469 US at 552. Michigan contends that _Garcia_ need not and should not be read so restrictively.

CONCLUSION

For the reasons noted in this brief, Michigan urges that the Court declare the 1985 Act, in toto, unconstitutional as a violation of the Guarantee Clause of the United States Constitution, Art IV, § 4.

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